

Prosecutors in the Boardroom

*Using Criminal Law to Regulate
Corporate Conduct*

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Potentially Perverse Effects of Corporate Civil Liability

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Careful analysis of incentives dominates the mature academic field of enterprise liability. Vicarious liability rests on the idea that firms can control the conduct of their agents. Assigning liability to firms promises to reduce legal violations by encouraging firms (really managers) to influence agent behavior.¹ Remaining arguments in the field center on how optimally to calibrate incentives when attaching liability to firms. For example, in an important work from which I have lifted my chapter title, Jennifer Arlen demonstrated that imposing strict liability on firms for agent misconduct, without crediting firms with a liability reduction for self-policing efforts, would encourage firms to avoid learning of legal violations by their agents.² Such an incentive would be perverse for a system aimed at effective outsourcing of some of the public enforcement function to firms—a necessary strategy in the modern environment of huge, complex, and opaque organizations.

As this volume perhaps makes clear, the abundant literature on enterprise liability has been missing an important part of the picture. The problem of adjusting incentives extends beyond the triangular relationship among liability rules, the firm, and the firm's agents. The enforcer of the liability rule is also a major, perhaps dominant, actor in determining the success of a liability scheme. The problem of the enforcer's incentives, like the problem of firm and agent incentives, grows more complex if multiple forms of enterprise liability—private civil, civil regulatory, and criminal—are layered over one another. A prime example is the law of securities fraud, under which class action plaintiffs, SEC enforcement lawyers, and DOJ prosecutors all enjoy potent authority to initiate big-ticket litigation.

As with incentives on firms to control their agents, miscalibrating incentives affecting enforcers may impede efforts to achieve the desired reduction of legal violations at acceptable cost. Consider the criminal enforcer whose conduct is the subject of this volume. Most students of corporate liability

agree that criminal prosecution of firms is the most severe form of enterprise liability and that the criminal remedy should be reserved for a small number of the “worst” cases in which it is most needed. (Some argue, of course, that criminal liability for firms should be abolished, a debate I will not enter here.) This stance ordinarily leads to discussion of two forms of control: replacing the *respondeat superior* regimes that dominate corporate criminal liability with more discerning vicarious liability rules that would select for the gravity of cases;³ and altering prosecution guidelines and other forms of control that determine how prosecutors select corporate cases for charging.⁴

This perspective on criminal enterprise liability omits something potentially crucial. The prosecutor’s decision whether and how to charge a corporate case criminally depends in important part on the operation of civil liability regimes that run alongside the criminal enforcement apparatus.⁵ Ian Ayres and John Braithwaite famously argued that an effective scheme for regulating organizations should be pyramidal, with escalating layers of increasingly sharp measures of control, starting at the bottom with self-regulation and capping off at the top with harsh forms of punishment.⁶ In such a pyramidal scheme, each more serious form of control ought to be used more sparingly than the less intrusive measure below it. The most powerful sanctions should be used least. But some form of very damaging sanction is essential because, without a sharp point on the pyramid, lower tiers of control lose influence.

Something like the converse also holds true. Lower levels of regulation must be sufficiently effective to prevent too many cases being pushed too quickly to the top of the pyramid. Holding with the metaphor, a system for regulating organizations that too soon and too often bypasses civil tiers to reach for the criminal capstone will become an inverted pyramid that will be unstable and lack a graduated scheme of incentives. Assuming for purposes of argument that the imposition of corporate criminal liability is as potentially costly as its critics argue, a regulatory scheme that tends to start with that form of liability will fail beneficially to balance regulatory effectiveness against cost.

How might a system of enterprise liability end up as an inverted pyramid? If civil forms of control appear to lack sufficient bite, regulators seeking to control conduct within organizations will tend to reach for criminal remedies. This effect will be most pronounced with respect to the level just below criminal liability: liability in civil regulatory actions. Especially if civil regulatory liability does not introduce sufficiently more meaningful sanctions than private civil liability (the next tier in turn below), there is risk that public enforcers will conclude that only criminal liability can achieve marginally greater effectiveness than private lawsuits, self-regulation, and other forms of control.

There is reason to think this dynamic operates to some degree in the relationship between criminal cases brought by the DOJ and civil regulatory actions brought by the SEC. Contrast the usual remedies obtained by the DOJ in a contemporary corporate prosecution with those the SEC usually obtains. A DOJ action typically will settle with a DPA. Under a DPA the offending firm, in addition to paying a monetary penalty, will admit criminal wrongdoing, accept institutional fault for having encouraged or allowed the violations, and agree to undertake a package of novel reforms and controls that is designed to reduce risk of future violations and is accompanied by severe consequences for failure to follow through.⁷ Notice that there is nothing traditionally criminal in this arrangement—no guilty plea or jury verdict, no sentencing, no punishment other than a fine.

An (often parallel) SEC action will usually settle with a consent decree under which the offending firm will neither admit nor deny wrongdoing, will agree to be enjoined for some period from further violations, will pay a large monetary penalty, and sometimes (though often not) agree to some institutional changes.⁸ Other than the injunction, violations of which are rarely if ever charged, little in this arrangement distinguishes it from private civil liability as a means of sanctioning firms. The replacement of a private citizen as plaintiff with the federal securities cop adds some gravity to the proceedings, but the routine practice of concluding cases without any finding or admission of wrongdoing by the firm may substantially blunt that effect. The SEC very rarely tries a case against a firm, and the “neither admit nor deny” settlement is a fixture in SEC practice.

In the current arrangement, the public enforcer asking herself how to achieve regulatory objectives in a major matter of financial misconduct within a large corporation or partnership is apt to say something like this: “In civil proceedings, the firm is likely to end up writing two checks, one to the class action plaintiffs and one to the SEC. These payments will hurt but they probably have been planned for and, the stock price having taken the expected hit from revelation of sanctionable wrongdoing, funds are being set aside for this if they had not been reserved already. Beyond the checks, the firm will have to admit nothing and will not be required to do much, if anything, to change itself, nor does it face a substantial risk of a later charge for violating an injunction. Does any of this accomplish enough, especially if this instance of wrongdoing occurred even though this firm or peer firms were subject to these forms of liability in the past? Only a potential criminal action that produces a clear normative signal about wrongdoing, a lasting admission from the firm, and a set of serious, enforceable reform measures promises to

achieve what is supposed to be the objective here: the use of enterprise liability to reduce risk of harmful wrongdoing in corporations in the future.”

The situation, at least in securities fraud liability for firms, is one of civil regulatory liability marginally distinguishing itself from private liability and criminal liability striving to rework itself into a form of civil regulatory liability. Maybe this is not cause for worry. If one thinks criminal liability should be avoided when possible and civil regulatory liability ought to do materially more to control firms than private civil liability, then the DOJ’s hybrid civil-criminal system of DPA settlements might fit comfortably in the regulatory space one wants occupied. But worries about too much criminal enforcement against firms have only grown stronger through a period of institutionalization of the criminal settlement. Still, we hear the claim that criminal liability is potentially disastrous for firms—that it is a legal weapon of mass destruction that can unleash reputational and other forces that cannot be controlled and that it affords too much leverage to DOJ actors who may wield this power without clear vision of proper regulatory objectives.

The response to these concerns should be plain. Enhance civil regulatory liability so that it, not criminal proceedings or the settlement thereof, lays claim to the regulatory tier between private civil liability and full-blown criminal prosecution. Failing to do so perpetuates a perverse dynamic whereby civil liability practices encourage resort to criminal redress. A different system of civil regulatory liability could alter the incentives operating on public enforcers. The result could be reduced use of the criminal action that everybody seems to agree is overdeployed and should be reserved, at most, for the infrequent, egregious, example-making case.

In the remainder of this chapter, I will address how to reform the civil regulatory action with this objective in mind, what is necessary to bring about such reforms, and problems that might arise from the adoption of such reforms. I will focus on the SEC enforcement action, where substantial changes appear most readily available under existing law. My arguments ought to be amenable to extension to other realms of enterprise regulation.

I. The Civil-Criminal Gap

In current practice, three features primarily distinguish a criminal enterprise case from a civil regulatory action: it stigmatizes more, it decides more, and it requires more of the firm.

The stigmatic effect—what economic analysis designates the reputational sanction—comes largely from the category of the proceeding itself. While

the matter is extremely hard to measure or quantify, the mere ascription of the label “criminal” to a firm, even at a preliminary investigative stage, can be punitive. This must be true because routinely in the corporate context rational, well-informed managers strive mightily to avoid even criminal allegations against their firms, and they move rapidly, often at major expense, to forestall or resolve potential criminal proceedings short of charging and trial. The potential stigmatic effect of a criminal proceeding will vary, of course, with the reputational stake of the firm (a pharmaceutical manufacturer will fear a criminal charge more than a garbage hauler) and the relevance of the particular matter to reputation (an oil company’s spoiling of an ecosystem may not have much effect on people’s desire to buy its fuel).⁹ But the prospect of criminal charges always gets a firm’s attention and frequently is perceived as threatening the firm’s survival.

The communicative impact of a criminal case will be greater, of course, if the legal proceedings say more, and say more decisively, about the nature of the firm’s wrongdoing. Criminal proceedings against a firm can be resolved in three ways (excepting the rare acquittal) but almost always end in only one of them. A trial might take place that results in a jury verdict. This resolution speaks particularly loudly because it represents the judgment of a disinterested group that considered a full portfolio of evidence and was instructed to base its judgment on near certainty. Of course, virtually no corporate criminal cases go to trial. Alternatively, a firm might plead guilty to a criminal charge. This speaks loudly as well. Admission of wrongdoing by a corporation is always unusual and noteworthy. The solemnity of a criminal plea before a judge lends particular weight to a corporate admission.

More commonly, a firm will enter into a criminal settlement with the government short of charging, or at least short of a guilty plea or trial. The idea of a “criminal settlement” is arguably an oxymoron. Ordinarily criminal cases are not “settled”; the defendant pleads guilty, usually with a plea agreement, or persists in a not-guilty plea and the case goes to trial. DPAs, pretrial diversion, and other nontraditional forms of resolution are modern innovations. Corporate criminal practice has adopted this approach as a means of resolving cases while avoiding pleas and trials, in part because of the potentially overpotent communicative effects of pleas and verdicts. A DPA is crafted to retain some of the message effects of a criminal proceeding by requiring the firm to admit a criminal violation and the facts making out that violation. In current practice, DPAs do “decide” the criminal case even if they do not result in adjudication.

Criminal cases against firms also tend to require more of firms. If a firm pleads guilty or is convicted at trial, it is subject to sentencing by a judge. The U.S. Sentencing Guidelines, while no longer binding, are the most influential authority in corporate sentencing. The Guidelines authorize courts not just to levy monetary sanctions on firms but also to impose probationary conditions requiring them “to remedy the harm caused by the offense and to eliminate or reduce the risk that the instant offense will cause future harm.”¹⁰ The Guidelines’ principal innovation in corporate sentencing is to tether the determination of financial penalties to the quality of a firm’s compliance efforts.¹¹ In theory at least, firms that make more extensive compliance efforts will be punished less should those efforts fail than they would be had they made no such efforts. In other words, in addition to empowering courts to order firms to change their practices *ex post*, the Guidelines encourage *ex ante* changes in the internal practices of firms.

Current DPA practice goes beyond the Guidelines in requiring changes in firm practices and governance. A typical DPA will require a firm to agree to alter or halt specific business lines or practices, to adopt or strengthen mechanisms for detecting and responding to agent wrongdoing, to accept intervention of an outside monitor with broad power to measure and report on the firm’s compliance, and to afford managers and employees additional resources for reporting violations and learning how to avoid them.¹²

The reformatory provisions of a DPA are connected directly to the aspect of the DPA that is decisive about the firm’s wrongdoing. The firm is required fully to admit wrongdoing in the settlement, including through a detailed factual admission. Though the firm has not pled guilty or been found guilty, it can no longer contest the merits of the case because it has conceded them. The firm must follow through on its commitments under the DPA or it faces near-certain and swift criminal liability.

Setting aside questions of the success of DPA practice, the aim is clear: to use the special bite of the criminal remedy against firms not just to punish them monetarily, in the form of a fine that might not be distinguishable from a large damages award in a civil class action, but to change firms to make future harm and wrongdoing by the firm’s agents less likely.

Compare the civil regulatory action, using the context of securities fraud. The SEC also settles almost all its enforcement actions. These civil settlements stigmatize less, decide less, and require less of the firm. Not only does an SEC settlement not match the criminal action’s tendency to ascribe the label of wrongdoer to a firm, it ascribes nothing. Standard practice in SEC enforcement is to permit settling firms to “neither admit nor deny” allegations in the

SEC's legal filings.¹³ In other words, an SEC enforcement action typically proceeds this way: the government says Firm A lied to the market about its financial results; Firm A denies having lied; some months later, the SEC says Firm A has agreed to pay a fine and be enjoined from future lies in order to resolve the charges against it; Firm A says it neither admits nor denies it lied and is happy to have put this liability matter behind it. Except that the complainant (the SEC) can re-trumpet its allegations in public documents, this practice does not seem distinguishable from a typical corporate settlement of a large lawsuit.

Undeniably, SEC enforcement actions have some stigmatic impact. The evidence shows that firms suffer hits to their share price, sometimes substantial, upon first revelation of an SEC investigation.¹⁴ It is less clear whether that impact stems from the SEC's involvement in the matter or simply from the market learning that a firm's financial practices might be unreliable.¹⁵ A later settlement with the SEC does not seem to impose large additional reputational sanction on a firm, suggesting that the regulatory action itself may be of lesser informational significance to the market.¹⁶

But the enforcement action itself says little. In the criminal action, a firm is both accused of and admits wrongdoing, usually in the form of a detailed description of the conduct and actors who violated the law and the relationship of those actions to the firm's management and practices. In the SEC action, the firm is alleged to have engaged in a less serious form of wrongdoing. Less culpability is required to establish civil liability, the burden of proof is much lower, and so on. The firm does not admit even bare-bones liability, much less facts of the wrongdoing. If one purpose of public enforcement of the law is to communicate messages, the SEC process greatly underexploits the message potential of law enforcement. This is a major thrust of U.S. District Judge Jed S. Rakoff's noted recent decision to reject the SEC's settlement of a high-profile matter of fraud relating to the 2008 financial crisis.¹⁷

SEC enforcement also has underexploited the forward-looking potential of public law enforcement. Criminal DPAs now routinely require firms to reorganize business operations, adopt compliance measures, submit to enhanced monitoring for legal violations, and create systems to encourage and protect whistle-blowers. Recently SEC settlements have begun to incorporate some of these measures.¹⁸ But these settlements rarely grant broad powers to independent monitors to ensure compliance (at most they require hiring a consultant and following its advice), and they lack sufficient incentives for firms to follow through.¹⁹

Legally, the forward-looking element of an SEC settlement is an injunctive order that tells a firm what securities laws have always told it: do not violate

the law. The injunction represents, at most, a probation under which the firm faces swifter, more certain, and larger penalties for a future violation than it did prior to its first violation. But these orders almost never produce later charges of injunction violation against firms. I failed to discover evidence of a single instance in which the SEC has sought redress for a firm's inadequate compliance with so-called undertakings in an injunctive settlement (judicial or administrative) requiring reform measures by the firm.

The lack of enforcement for compliance produces a double deficit. It deprives the enforcement system of a potentially powerful incentive on firms to comply with reform commitments, in the form of a tangible, observable risk of legal consequences for noncompliance. And it misses a potentially efficient legal device for regulating firms. A shortcut proceeding for an injunction violation is likely to be far quicker, less costly, and more difficult for a defendant to resist than the SEC's filing of an original lawsuit.

The point about admissions in settlements connects tightly to the point about settlements having reform requirements that carry real teeth. The criminal DPA highly motivates firms to follow through on their obligations because the admission of facts and liability generally required in a DPA means that, if DOJ seeks relief for noncompliance with the settlement, it does so with a very big stick. Admission in hand, DOJ could proceed almost directly to a full criminal conviction, with all its consequences, including sentencing before a judge. The SEC does not carry the big stick of an express route to full judicial (or administrative) remedies for the original violation—because it has no admission on the merits by the firm.

Return to the perspective of a hypothetical public enforcer looking at these two systems and deciding what to do in an instance of serious law violations within a corporation. The enforcer understands her mission to be to pursue the case in a manner that advances the basic objectives of punishment to deliver retribution to wrongdoers and efficiently reduce future production of social harm. She knows that retribution qua retribution is not a meaningful aim because a corporation cannot feel pain from deprivation of liberty or being labeled a criminal. Her only socially beneficial objective can be to enforce the law against the firm in a manner likely to reduce the incidence of future legal violations at justifiable cost.

On the one hand, the enforcer has a system that will assign a strong form of blame to the corporation that will communicate clearly to both outsiders and insiders the seriousness of what went wrong and the importance of working in the future to avoid occasions for such condemnation. This system will further provide a vehicle for tailoring remedies to the specific firm and

wrongdoing. On the other hand, the enforcer has a system that rests primarily on the blunt instrument of a large monetary sanction. This system is supposed to discourage future law violations by pricing them higher. But this approach is not distinguishable from that of any civil liability mechanism. It has insufficient fealty to the idea that public law enforcement has any special role or potency in the projects of specific and general deterrence.

If the enforcer cares about more than churning cases and filling government coffers—if she hopes her efforts might lessen the future need for her and others’ costly interventions—she is highly likely to choose the criminal remedy over the civil one, or at least choose it in addition to the civil one. The shortage of special features in the civil regulatory proceeding will be a major motivation for her choice. Her choice becomes even more likely if the particular firm or peer firms have been subject to civil sanctions for past instances of the same or similar violations. In that case it becomes almost undeniable that a civil proceeding’s slack message effects will not substantially affect the firm’s or the industry’s behavior. (Of course, in the current system there is no such single enforcer choosing between civil and criminal liability, even though criminal enforcers are directed to consider the adequacy of available civil remedies before charging. But, as Brandon Garrett discusses in this volume, there is extensive dialogue between the SEC and DOJ over enforcement and litigation decisions.)

A straightforward way to alter the public enforcer’s incentives is to adjust the nature of the civil proceeding so that it approximates more the criminal proceeding. To do so, one need not render the civil proceeding criminal. Indeed, the criminal proceeding has already done some of this work by altering itself through DPA practice to become more civil in nature. Why has the criminal proceeding been moving in the civil direction? Because of the concern about the overpotency of corporate criminal liability that has produced so much of the criticism of the doctrine and practice that lead to criminal charges against firms.

Likewise, we should move the civil proceeding in the direction of the criminal proceeding, to provide enforcers with a more attractive alternative to criminal liability for firms. Doing so promises further to reduce excessive costs that can result from the imposition of criminal liability, which has potentially beneficial message effects but can unleash uncontrollable and overly harsh reputational consequences.²⁰ If the criminal and civil regulatory forms of enterprise liability were to meet halfway—in the space that everyone, including the DOJ, seems to be seeking between simple monetary sanctions and the potential “corporate death sentence” of a prosecution—then a

more supple and efficient enforcement scheme could emerge. If, however, a large chasm remains between criminal and civil proceedings, then the relative weakness of civil regulatory liability is likely to continue to make civil liability its own worst enemy, causing public enforcers to find it inadequate in cases of serious wrongdoing.

I will now consider measures necessary to push civil regulatory liability in the direction of criminal liability.

II. Reform Measures

Returning to the three distinctive characteristics of criminal enterprise liability, civil regulatory liability should be refashioned so that it has greater reputational consequences, decides more, and requires more of firms. Again choosing SEC enforcement of the securities laws as my example, several changes in law and practice could accomplish these objectives.

I will start with the third objective—requiring more of firms—because it is the simplest to adjust. The Securities Act of 1933 and the Exchange Act of 1934 have always included broad grants of power to the SEC to seek injunctive relief in federal court in response to fraud violations.²¹ Injunctions in SEC enforcement actions, as well as the exercise by federal district courts of equitable powers, have long been available in any enforcement case in which the SEC can demonstrate “a reasonable likelihood of further violations in the future”—a condition that explicitly rests on the deterrence-based justification for including forward-looking remedies in a scheme of corporate enforcement.²² A feature of the Sarbanes-Oxley Act of 2002 made this power more explicit and extended it, by authorizing the SEC to ask a federal court to grant “any equitable relief that may be appropriate or necessary for the benefit of investors.”²³ This equitable power easily encompasses measures designed to prevent future wrongdoing, such as requiring a firm to alter business practices, institute compliance programs, submit to monitoring for future violations, and encourage and protect whistle-blowers.

DOJ prosecutors, who enjoy a high degree of independence from bureaucratic controls (especially in decentralized U.S. Attorneys’ offices),²⁴ have been more innovative and freewheeling in developing remedies and settlement schemes. With the criminal charge at their disposal, they also enjoy greater leverage to force these measures into settlements. SEC enforcement lawyers are more tightly controlled by a central bureaucracy within the Enforcement Division, and their charging and settlement decisions require express approval of the five-member commission. This can slow things down

substantially, which can greatly reduce the effectiveness of an enforcer's efforts to persuade firms to agree to extensive settlement terms.

One might be pessimistic that institutional redesign can dramatically alter SEC behavior in the face of pressures on the SEC staff to fall under the capture of those they regulate. Regulatory capture is a potential problem for any agency, prosecution offices included. The relevant issue is relative vulnerability to capture. The SEC has a strong tradition of independence compared with many other agencies that regulate more narrowly and with greater intimacy. The SEC's jurisdiction and mandate are broad. The Enforcement Division in particular is accustomed to taking a more adversarial posture toward the industries within its domain.²⁵ And the new director of enforcement, a former prosecutor, has signaled his intent to press the division further in that direction.²⁶

Remaining impediments to more far-reaching SEC settlements can be removed. In serious cases with important message implications and potential, SEC settlements should require a package of DPA-like remedial terms that include strong monitoring and *ex post* enforcement features. The commission—perhaps through formal rulemaking—should establish guidelines that specify objectives and measures for the settlement process that are designed to bring about forward-looking and lasting change in offending firms.²⁷ The commission should state that if firms refuse to pursue productive negotiation of such measures in cases in which they are appropriate, the SEC will seek federal court order of those measures in litigation. And, as the new director of enforcement has quickly recognized and stated, the SEC must internally streamline its enforcement process.²⁸

That leaves the problem of how to make the SEC's litigation threat credible and sufficiently potent. Firms must believe that nonsettlement will lead to trial, that trial is likely to lead to loss, and that loss is likely to mean imposition of stronger sanctions. To generate this belief, the SEC must try some cases and be happy to try more of them. The Enforcement Division very rarely goes to trial, and virtually never in cases against large corporations. Its attorneys who work in the courts (who in turn are separated, unlike DOJ lawyers, from the attorneys who investigate the cases) more closely resemble the "litigators" of large corporate law firms than the trial lawyers who staff U.S. Attorneys' offices. Changes in culture, hiring practices, and internal review mechanisms and incentives at the SEC are necessary to make the SEC a trial-ready and trial-eager operation that can credibly threaten firms in settlement negotiations. The SEC should move away from its current enforcement culture of aiming toward a press conference at which the agency announces another large payment from a corporation.

Firms must also believe that remedies imposed by a court after trial are likely to be more onerous than the conditions of a settlement with the SEC. The criminal liability that awaits a firm that refuses a DPA of course cannot be imposed in an SEC enforcement lawsuit. But a court can impose very large monetary sanctions. Outside the settlement context, firms exert little control over the size of that penalty, meaning that an enforcement action looms much larger over the financial future of a firm when the potential of a trial and court-ordered penalties increases uncertainty. The SEC should be prepared to bargain away some of the potential monetary penalty, in addition to uncertainty about that penalty, in exchange for remedial measures more likely to avert further wrongdoing and harm. Large settlement numbers are impressive in *Wall Street Journal* headlines, but they may not have adequate lasting effect.

There is another possible explanation for the SEC's less active role than DOJ in settlements that require changes in the conduct of firms. The agency might believe it lacks the expertise and, even more, the resources to implement an enforcement regime that resembles the DOJ's DPA scheme. An obvious rejoinder is to say that the specialized SEC ought to be, if anything, more confident than the generalist DOJ in its ability to design systems for reducing fraud in corporations and financial markets. If the DOJ can do it, so can the SEC.

The resource concern is more serious. As the DOJ has demonstrated, some of the costs of such a system can be outsourced to corporations, as, for example, through the appointment of private monitors funded by the firm. Still, an Enforcement Division forced to try massive cases of financial reporting failure against large corporations more frequently, and tasked with ongoing monitoring and enforcement of complex settlements, might grind to a halt, leaving unaddressed many important cases of individual and enterprise wrongdoing in markets.

But the DOJ has limited resources too. It rarely tries a corporate case, yet its threats are credible. The potency of the criminal remedy explains much of that credibility, but that does not mean the SEC would have to try many cases to obtain greater settlement leverage. An occasional trial against a large defendant, followed by the imposition of severe court-ordered remedies, should be sufficient to encourage forceful settlement agreements in the lion's share of SEC cases against firms. If the Enforcement Division needed some additional resources to accomplish this—such as the funding of a small trial unit dedicated to taking a few big cases all the way—the money would be well spent.

Now to the harder part of reforming SEC enforcement against firms. To make enforcement cases decide more and impose greater reputational effects (of course also enhancing the SEC's ability to lever remedial measures in settle-

ments), one would want to eliminate the “neither admit nor deny” feature of the SEC enforcement case. This practice is pernicious because it gives away much of what distinguishes a public enforcement case from one of private liability.

In private litigation, almost all of which settles in the context of securities fraud, plaintiffs are generally happy to bargain away any finding or admission of wrongdoing by the defendant because plaintiffs are in it for themselves. If they obtain the compensation they seek, they care not whether the firm tells the world it did something wrong. Regulatory enforcement is pursued on behalf of the public, who for good reasons would very much like to be told whether the firm is a lawbreaker and, if so, exactly how and to what extent. The public would much prefer to learn this from an admission or a careful adjudicatory process than from the mere allegation of it in a federal agency’s complaint that, beyond at most a motion to dismiss, is never subject to the scrutiny of legal process.

Trying more enforcement cases would recover a bit of this loss of the law’s communicative potential. But message effects should not be squandered in the settlement process either. The SEC, like the DOJ, should require firms to admit liability and the facts of wrongdoing when it seeks to sanction them for serious violations of the securities laws. It is practically an abdication of responsibility for a public enforcer to resolve almost all its cases with no conclusion by the legal process as to whether wrongdoing occurred—especially an enforcer that professes to be in the business of making examples and communicating messages to market participants about norms of behavior and legal compliance. The most that can be said for current practice is that “everyone knows” that when the SEC alleges a violation, that means the firm really did it. Imagine if a criminal prosecutor were to rest her enforcement practices on such a foundation: “I mostly just indict cases without requiring an admission, plea, or trial because the indictment itself speaks clearly enough and imposes ample sanction.”

Of course I am being quite unfair. The SEC’s “neither admit nor deny” practice has a good rationale. The obvious reason for the SEC to forgo requiring admissions by firms is that firms would mightily resist settlements with devastating potential in collateral civil litigation. Securities fraud class action lawsuits lead to billions of dollars of recovery against corporations every year. Given that Rule 10b-5 affords a right of action to both investors and the government, a civil class action lawsuit is certain in any case in which the SEC brings a significant enforcement action for fraud.

Because of the huge cost of trying a large, complex fraud action, defendant leverage in the settlement of such suits comes mostly from the motion

to dismiss. The Private Securities Litigation Reform Act (“PSLRA”) sought to reduce the costs of securities fraud class actions for defendants, especially the costs of settling “strike suits” to avoid the expense of discovery and summary judgment litigation, primarily by making the motion to dismiss easier to win. To survive a motion to dismiss, plaintiffs must plead particular facts giving rise to a strong inference (meaning one at least as strong as any alternative) that the defendant acted with the requisite state of mind (“scienter”) for fraud liability.²⁹ This affords defendants a powerful weapon because state of mind is difficult to establish, even by inference, in the absence of access to a firm’s records and witnesses through discovery.

Requiring firms to admit fraud in public enforcement proceedings obviously would remove not just the PSLRA’s barriers but also potentially all barriers to private liability, including trial risk for the plaintiff. Class action plaintiffs could simply print a copy of the settlement documents in the SEC enforcement proceeding, take them to a judge and if necessary a jury, and offer them as admissions to support denial of a motion to dismiss or for summary judgment, or even to support a jury verdict.

It is not an acceptable answer to this problem to throw up one’s hands and say that the “neither admit nor deny” practice in SEC settlements is unavoidable. Possibilities exist for dealing with the preclusive problem that admission-based settlement practices would present. Among the powers that the SEC enjoys but private plaintiffs do not is the ability to bring a case for securities fraud under Section 17 of the Securities Act rather than (or in addition to) a case under Rule 10b-5 of the Exchange Act.³⁰ The law of Section 17, unlike 10b-5 law, does not require proof of scienter for liability.³¹ The SEC could ask firms to settle enforcement actions for fraud by admitting violation of section 17 but not violation of 10b-5.

This approach would have two limitations. Firms might still strongly resist settlement because they do not want to concede other elements of section 17 liability, such as materiality, that would also in part establish 10b-5 liability. And the message effects of a Section 17 settlement would be weaker than those of a 10b-5 settlement. This is precisely because the enforcement action would not communicate anything about the mental state accompanying the fraud, which is arguably the chief culpability measure for fraud and the one most commonly used to distinguish “mere” civil fraud from more serious fraud meriting regulatory or criminal sanctions.

Another approach would be to ensure that the SEC settlement does not precede resolution of the class action lawsuit. But this would be an ill-advised means of dealing with worries about collateral consequences. Public enforce-

ment actions should rarely if ever be held hostage to private lawsuits. Delay can greatly weaken the benefits of public law enforcement, and unwelcome incentives are likely to develop, causing defendants to slow down civil litigation to avoid public sanctions.

More fundamental change would be needed to do away effectively and beneficially with the “neither admit nor deny” settlement. More direct responses to the problem would be to bar collateral use of an SEC settlement or, as many are arguing for a host of reasons, to couple the private lawsuit for securities fraud with the SEC enforcement action. Both approaches likely would require legislation, as well as new rulemaking, and would occasion comprehensive reevaluation of the private and public enforcement scheme for securities fraud.

An amendment to the existing PSLRA scheme could dictate that liability concessions and factual statements in litigation initiated by the SEC are inadmissible in civil class action lawsuits. Civil plaintiffs would retain the burden of producing facts sufficient to establish a strong inference of scienter at the motion to dismiss stage, as well as the burden of ultimately convincing a jury of the facts of the defendant’s fraudulent conduct.

These protections might not be sufficient to encourage defendants to accept settlements with the SEC that include admissions of fraud. Even with evidentiary protections, defendants would not want to admit fraud in court on the record. Their concerns would include that judges and juries deciding related private lawsuits would inevitably learn of these admissions and could not be expected to keep them from affecting their decisions, and that it would be at the very least awkward for the firm’s counsel to maintain: “Yes we said this was a fraud in our SEC settlement but let me show you why the plaintiffs can prove no such thing.” Placing firms in this legal posture potentially would dilute the same message effects of the regulatory proceeding I am arguing should be nurtured and exploited.

This analysis leads to the conclusion that the private action for securities fraud needs rethinking and reform of a larger order. This may be a welcome conclusion because it dovetails with several recent arguments by scholars of securities law that the public and private liability scheme for securities fraud is badly suboptimal in deterring fraud.³² My contention that existing incentives for public enforcers also are suboptimal adds another justification for recrafting the full liability scheme.

The envisioned reform is not of the PSLRA variety. The objective is not simply to tinker with the weights on the existing liability scale, making it a bit harder here and there for the private plaintiff to bring her case. The objec-

tive is to design a full scheme of fraud liability that gets all four forms of civil liability working together to produce effective deterrence: public liability of firms, public liability of individuals, private liability of firms, and private liability of individuals.

Present law and practice sometimes pursue all four forms of liability in seemingly arbitrary ways that do not recognize interactive effects. For example, settlement of class action suits for securities fraud will often impose huge liability on a firm without imposing significant individual liability on managers responsible for the fraud. This arguably fails to advance deterrence because firm liability falls on the innocent shareholders not lucky enough to have disposed of their equity stakes before revelation of the fraud. In the future, managers who decide whether to pursue fraud know they will not bear liability costs for fraud. At worst, they will lose employment. But that same fear of employment loss may be the motive for fraud.

Some have argued that the SEC ought to be granted review and approval powers over private securities fraud litigation in order to improve coordination among sanctioning mechanisms.³³ The SEC might be given the authority to veto the filing of a securities fraud class action and the consummation of a settlement of such a case when the case or settlement does not advance the public interest in deterring fraud. Among other things, such a power would enable the SEC to bargain with firms over private liability in the settlement of enforcement actions. For example, the SEC could offer resolution of private liability in exchange for a real admission of serious wrongdoing and meaningful remedial measures, as well as a substantial monetary penalty to go to a compensatory fund for harmed investors.

A simpler means of eliminating the problem of the preclusive effect of SEC settlements is to do away with the private right of action under 10b-5. The elimination of private civil liability would be an overly sweeping measure, at least as a first step. Enforcement resources for the SEC already are a major concern, and invigorating SEC enforcement against firms to any degree, as I am advocating, will require additional resources. Privatizing some securities fraud enforcement is likely to remain attractive to many, not least the SEC itself.

But if a sensible liability scheme includes a foundation of widely available private liability supplemented by public enforcement for a select and important group of cases, it makes little sense to continue to pursue such a scheme without empowering a knowledgeable body to sit in review of the system and make rational and well-informed decisions about which cases merit public enforcement. The involvement of such a body promises not

only to spend enforcement resources more wisely but also to ensure that cases of public enforcement stigmatize more, decide more, and require more of firms.

III. Potential Problems with Reform

I have argued for extensive change in regulatory enforcement practice, in the name of more judicious use of the criminal enterprise sanction. Dramatic institutional change, especially in an area as large and hotly contested as securities enforcement, ensures big complications and big fights. For example, consideration of whether to supplement much of criminal enforcement against corporations with enhanced civil enforcement would need to include empirical analysis, to the extent feasible, of the relative costs of the civil versus criminal processes, to both the state and firms. This brief chapter is not the place to engage fully with such implications.

I will consider just two complicating questions at the conceptual level. First, who is to say that a renovated SEC enforcement practice would not produce the same potentially cataclysmic and uncontrollable reputational sanction against firms that is said to be a principal flaw of corporate criminal liability? Second, if another flaw of existing corporate criminal practice is the questionable competence of criminal enforcers at reforming business enterprises, who is to say that the SEC would be any better at the job?

The first question is particularly hard to answer, or even speculate about, because it involves a huge counterfactual. Reputational sanctions resist measurement and explanation. We know that in general firms experience substantial reductions in equity value when it is revealed that they have engaged in fraud. We can be reasonably sure that a large portion of those reductions are explained not by the expectation that the firm will suffer legal sanctions but by what new information about fraud reveals about a firm's reliability as a potential supplier, customer, partner, or investment. We also can easily observe that, at least within reputationally sensitive firms, firm managers believe that serious legal proceedings, especially criminal ones, can have potentially devastating effects on business.

We do not know, however, how much the legal process adds to reputational sanctions other than serving as a source in some cases for first revelation of the wrongdoing. Other than watching how rational managers run from it, we do not know how much more of a reputational sanction the criminal process imposes on firms than a civil regulatory process. Reasons for absence of knowledge include that a firm's publicly traded equity price—

the measure of reputational sanction that empiricists have used—is only one measure of an event’s economic effects on a firm, and that equity markets do not fundamentally reflect the true value of enterprises.

Lack of evidence makes it difficult to say how much the mere label “criminal”—whether imposed by a court or admitted by a firm—explains the potential oversanctioning, as through collapse of the firm, that can occur when the DOJ proceeds fully in a criminal action. There are grounds for doubt. The “criminal” label alone cannot be enough to destroy a firm. Without killing firms, that label has been attached to reputationally sensitive firms in DPA settlements, along with serious inculpatory admissions. Why should an indictment, which represents only a probable cause finding, be *more* reputationally damaging than a full admission of criminality? The only conceivable reason is fear that the criminal process could put the firm out of business by leading to revocation of licensure. But revocation of licensure affects only some firms and is routinely bargained away in settlement of criminal cases.

While waiting for definitive evidence about reputational sanctions that may not be forthcoming, it makes sense to explore reputational effects experimentally. We currently have a system of imposing criminal liability on firms, or at least putting them in criminal liability’s shadow, that is criticized for being too potent because it may impose a crippling reputational sanction that the legal system cannot forecast or control. Given this status quo, there is no good reason not to see what would happen to reputational sanctions if we began to replace some of those criminal or shadow-criminal proceedings with civil regulatory actions that aimed, among other things, to impose a greater reputational sanction than current civil practice. At the very worst, we would end up no better off because the enhanced civil process would turn out to have the very same effects as the existing criminal one. But this seems doubtful. More likely, we would discover a middle ground where the enforcement process would better exploit the beneficial influences of reputational sanctions without the same risk of letting loose an uncontrollable force that produces oversanctioning.

The second question I have raised is whether SEC enforcement personnel would be subject to the same criticism currently leveled at DOJ lawyers in corporate criminal practice: that they are not equipped to engage in corporate governance. Imposing remedial measures on firms through DPAs can waste corporate assets, interfere with efficient management of the firm, and perhaps even make control of wrongdoing within firms more difficult. This critique has at least two components. One is that enforcers act *ex post*

in response to wrongdoing, whereas governance design is better conducted from an *ex ante* perspective. In other words, it is a bad idea to regulate by prosecution. The other component is that criminal prosecutors do not know anything about how to manage businesses.

The first element of the critique applies equally to SEC lawyers as to DOJ lawyers. If engaging in firm-specific *ex post* regulation is detrimental, then no enforcement practice should do anything other than impose sufficiently large monetary penalties on firms to deter future wrongdoing. On this argument, even the Sentencing Guidelines should steer judges away from imposing probationary conditions on firms.

This position does not directly engage with the debate I have entered. The purpose of enhancing regulatory enforcement against firms, I contend, is to do a better job at lower cost than would a practice dominated by criminal enforcement—*given* agreement about an objective of reforming firms to avert future violations.

In any event, reforming firms *is* a worthy project. To reject the idea that changing an organization can be an effective way to make wrongdoing less likely is to disregard a fundamental fact about corporate crime. Especially in the most serious and damaging cases that involve widespread unlawful practices, organizational structure and culture can be major causal factors in wrongdoing by a firm's agents.

I have argued elsewhere that corporate criminal enforcement ought to focus above all on cases of genuine *institutional* production of wrongdoing.³⁴ Those are cases in which ascribing blame at the institutional rather than individual level is most justified and most likely to send useful messages about how institutions ought to arrange themselves so as not to produce law-breaking. If holding firms responsible for their agents' violations is, in some instances at least, an ascription of responsibility to organizational culture, practices, and structure, then it makes little sense to miss an opportunity in that process to correct problems in culture, practices, and structure. Those problems can be much more clearly visible from an *ex post*, wrongdoing-centered perspective than from a generalized *ex ante* perspective. It might be true in the context of individual punishment that, with rehabilitation, "nothing works." But we have not yet learned that to be true for corporations.³⁵

That leaves the question of who ought to be doing the rehabilitation. It cannot be the firm itself, at least not alone, because by definition a case of public enforcement is a case in which self-regulation has failed. Three choices remain: the executive branch enforcer, a court, or a private third party. The DOJ's current DPA practice combines the executive branch enforcer with a

private third party hired to serve as an outside monitor of the firm's efforts to reform its practices. An enhanced SEC enforcement process of the type I suggest would be superior at least because it would combine all three possible actors.

In a settlement in a district court injunctive action, the SEC could, like the DOJ, require a firm to make changes, and it could delegate some or most of the monitoring function to a private third party. But unlike a DPA, such a settlement would require the approval of a federal judge and could, through reporting requirements, include oversight of the monitoring and compliance process by the federal court. This would address a major objection to current DPA practice: the almost complete lack of judicial review.³⁶ In addition, the SEC might improve upon present DPA practice by seeking third-party monitors with industry expertise suited to the firm in question. (Another alleged fault of DPA practice is to give the monitor job to litigation attorneys at large law firms, many of them former DOJ prosecutors.)

Having the SEC handle most cases of reform-based enforcement against firms might offer additional improvements over the present DOJ-driven practice. An objection to the DPA regime, at least among those representing firms, has been that individual prosecutors' offices, as well as Main Justice, have been inconsistent in their crafting and application of DPA settlements and that firms lack predictability when dealing with the DOJ over a case of serious wrongdoing. The SEC is more bureaucratized. The commission must approve settlements of cases brought by the Enforcement Division. That centralized process—as well as potential rulemaking and other guidance by the commission—could generate, over time, clearer and more consistent standards for the content and form of corporate settlements. This would fill a gap in current SEC policies, which include no such guidelines.

The objection would certainly remain that the SEC ought not be in the business of dictating matters of corporate governance that are the proper concern of state corporate law. But that objection tends to rest on a theoretical and unrealistic division between federal and state regulation of business enterprises.³⁷ The truth is that, by pursuing its core mission of regulating disclosure, the SEC inevitably regulates primary behavior within corporations. For the SEC to settle a case of fraud in financial reporting by requiring a firm to alter its financial reporting practices is only to do more directly what it already does indirectly. Arguably the SEC's commissioners and professional staff are better equipped not only than DOJ lawyers but also than Delaware judges to determine how a firm might change its practices at acceptable cost to avoid future violations of the securities laws.

IV. Conclusion

A scheme for behavior control that includes overlapping forms of liability must account for the incentives that determine the choices enforcers and litigants make about which cases to pursue. A valid objective of a scheme with multiple layers of liability is to impose graduated incentives on actors whose behavior is subject to control, so that increasingly more serious (and increasingly fewer) instances of wrongdoing are met with increasingly more severe sanctions. In a scheme with such an objective, incentives are perverse if they encourage enforcers to bypass lower levels of control in favor of higher ones, leading to harsh treatment of more cases than are treated less severely.

At least in the enforcement of the securities laws—and possibly in other areas in which criminal liability for firms overlaps regulatory liability—the current liability scheme produces perverse incentives for enforcers. The DOJ has been proceeding more frequently with criminal investigations, charges, and settlements against firms in part because the civil process does not offer a package of remedies that fully occupies the regulatory tier between private civil and public criminal enforcement. Reforming the SEC enforcement process against firms so that the SEC process stigmatizes more, decides more, and requires more of firms would help that process occupy the vacant regulatory space. The result would be more judicious use of the criminal sanction against firms. That appears to be a common goal among judges, academics, practitioners, and business enterprises.

NOTES

1. E.g., Jennifer Arlen, *Corporate Crime and Its Control*, in 1 *The New Palgrave Dictionary of Economics and the Law* 492, 493 (Peter Newman ed., 1998); Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 Cal. L. Rev. 1345 (1982); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 Yale L.J. 1231 (1984); Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 Yale L.J. 857 (1984).

2. Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. Legal Stud. 833 (1994).

3. E.g., Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 Minn. L. Rev. 1095 (1991); Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. Rev. 687 (1997); Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 Ind. L.J. 473 (2006); William S. Laufer & Alan Strudler, *Corporate Intentionality, Desert, and Variants of Vicarious Liability*, 37 Am. Crim. L. Rev. 1285 (2000).

4. See Brandon L. Garrett, *Structural Reform Prosecution*, 93 Va. L. Rev. 853 (2007).

5. U.S. Dep't of Justice, U.S. Attorneys' Manual, § 9-28.1100 (Principles of Federal Prosecution of Business Organizations), *available at* <http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf>.
6. Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* 19-53 (1992).
7. *E.g.*, U.S. Dep't of Justice, U.S. Attorney, Southern District of New York, KPMG—Deferred Prosecution Agreement (Aug. 26, 2005), *available at* <http://www.usdoj.gov/usao/nys/pressreleases/Augusto5/kpmgdpagmt.pdf>; U.S. Dep't of Justice, U.S. Attorney, District of Florida, UBS AG—Deferred Prosecution Agreement, *available at* http://www.usdoj.gov/tax/UBS_Signed_Deferred_Prosecution_Agreement.pdf.
8. *E.g.*, Press Release, U.S. Sec. & Exch. Comm'n, Commission Settles Civil Fraud Action Against Vivendi Universal, Release No. 2003-184 (Dec. 23, 2003), *available at* <http://www.sec.gov/news/press/2003-184.htm>; Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Agreement with Canadian Imperial Bank of Commerce, Release No. 2003-180 (Dec. 22, 2003), *available at* <http://www.sec.gov/news/press/2003-180.htm>.
9. Cindy R. Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J. L. & Econ. 489 (1999).
10. U.S. Sentencing Guidelines Manual Ch. 8 §§ 8B1.2, 8D1.3 (2008).
11. *Id.* § 8C2.5.
12. *E.g.*, KPMG DPA, *supra* note 7.
13. *See supra* note 8. The SEC recently produced a publicly available manual providing guidance to its attorneys about how to handle enforcement matters. The manual, however, focuses on investigative practices and says almost nothing about settlement of cases. U.S. Sec. & Exch. Comm'n, Division of Enforcement, Enforcement Manual (Oct. 6, 2008), *available at* <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.
14. Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, *The Cost to Firms of Cooking the Books*, 43 J. Fin. & Quant. Analysis 581 (2008); *see also* Stephen Choi & Marcel Kahan, *The Market Penalty for Mutual Fund Scandals*, 87 B.U. L. Rev. 1021 (2007).
15. The best current effort to tease these two factors apart, Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, *The Legal Penalties for Financial Misrepresentation* (Working Paper, May 1, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=933333, relies on the obviously debatable assumption that the reputational effect independent of the government's involvement is measured by a firm's overall decline in market value less any legal penalties ultimately imposed. *Id.* at 19-21.
16. *See id.* at 11.
17. SEC v. Bank of America Corp., 2009 WL 2916822 (S.D.N.Y. Sept. 14, 2009).
18. These developments are thoroughly catalogued and summarized in two works: Jayne W. Barnard, *Corporate Therapeutics at the Securities and Exchange Commission*, 3 Colum. Bus. L. Rev. 793 (2008), and Jennifer O'Hare, *The Use of the Corporate Monitor in SEC Enforcement Actions*, 1 Brook. J. Corp. Fin. & Com. L. 89 (2006).
19. A typical recent settlement is *In re Applix, Inc.*, Securities Act of 1933 Release No. 8651, 2006 SEC LEXIS 8 (Jan. 4, 2006), which required a firm charged with improper revenue recognition to hire and follow the recommendations of a consultant that would review its financial policies. Among the most ambitious recent settlements have been those involving "market timing" and "late trading" in the mutual fund industry. These settlements have required firms not only to hire and follow the recommendations of consultants but also to

appoint new independent trustees to their boards who undertake an obligation to report to the SEC on firms' reform progress. See, e.g., *In re Banc of America Capital Management, LLC*, Securities Act of 1933 Release No. 8538, 2005 SEC LEXIS 291 (Feb. 9, 2005).

20. Buell, *supra* note 3.

21. 15 U.S.C. §§ 77t, 78u(d) (2009).

22. SEC v. Savoy Indus. 587 F.2d 1149, 1168 (D.C. Cir. 1978) (quoting SEC v. Commonwealth Chem. Sec., Inc., 575 F.2d 90, 99–100 (2d Cir. 1978)).

23. 15 U.S.C. § 78u(d)(5).

24. See Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 Colum. L. Rev. 749 (2003); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 U.C.L.A. L. Rev. 757 (1999).

25. See John C. Coffee, Jr., *The Spitzer Legacy and the Cuomo Future*, N.Y.L.J., Mar. 20, 2008, at 5.

26. See John Herzfeld & Phyllis Diamond, *Khuzami Unveils Broad Reorganization of Enforcement Divisions, New Subpoena Powers*, BNA Corp. Accountability & Fraud Daily, Aug. 7, 2009. The enforcement director's August 5, 2009, speech is available at <http://www.securitiesdocket.com/wp-content/uploads/2009/08/speechfirst-100-days.pdf>.

27. The only guidance the SEC has provided of this type is a recent statement about general factors the SEC will consider in deciding whether to impose a monetary penalty on a firm. Press Release, U.S. Sec. & Exch. Comm'n, Statement Concerning Financial Penalties (Jan. 4, 2006), available at <http://www.sec.gov/news/press/2006-4.htm>. This statement and related policies are currently subject to criticism and might be revised or revoked. See Mark K. Schonfeld, *Back to the Future: Chairman Shapiro Ends Pilot Program for Corporate Penalties, Eliminates Commission Pre-authorization, Allows Staff to Negotiate*, 41 BNA Sec. Reg. & L. Rep. 307 (Feb. 23, 2009).

28. See *supra* note 26.

29. 15 U.S.C. § 78u-4(b)(2).

30. Maldonado v. Dominguez, 137 F.3d 1, 6–8 (1st Cir. 1998); Landry v. All Am. Assur. Co., 688 F.2d 381, 387–92 (5th Cir. 1982).

31. Aaron v. SEC, 446 U.S. 680, 691 (1980).

32. Merritt B. Fox, *Civil Liability and Mandatory Disclosure*, 109 Colum. L. Rev. 237 (2009); Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 Colum. L. Rev. 1301 (2008); Jennifer H. Arlen, *Public Versus Private Enforcement of Securities Fraud* (2007) (working paper on file with author); John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534 (2006).

33. E.g., Rose, *supra* note 32.

34. Buell, *supra* note 3.

35. But see Kimberly D. Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 32 Fl. St. U. L. Rev. 571 (2005); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 Wash. U. L.Q. 487 (2003).

36. Garrett, *supra* note 4.

37. E.g., Paul G. Mahoney, *Mandatory Disclosure as a Solution to Agency Problems*, 62 U. Chi. L. Rev. 1047 (1995); Robert B. Ahdieh, *Trapped in a Metaphor: The Limited Implications of Federalism for Corporate Governance*, 77 Geo. Wash. L. Rev. 255 (2009); Mark J. Roe, *Washington and Delaware as Corporate Lawmakers*, 34 Del. J. Corp. L. 1 (2009).